

# Subpoenaing Persons and Documents Made Easier: Changes to Federal Rule of Civil Procedure 45

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The rules that govern subpoenas have always contained traps for the unwary, as well as grounds on which to challenge potentially invalid subpoenas. Effective December 1, 2013, however, amendments to Rule 45 of the Federal Rules of Civil Procedure clarified and streamlined the processes for issuing and responding to subpoenas. Are you aware of the differences?

Under the old rule, a subpoena for deposition or production of documents could be issued only from the court for the district where the deposition was to be taken or the production of documents was to be made. This required counsel in litigation pending outside of Wisconsin to issue the subpoena from the correct federal district court in Wisconsin, while also identifying on the subpoena the court in which the action was pending on the subpoena. As amended, Rule 45(a)(2) simplifies this process by providing that a subpoena must issue from the court "where the action is pending". This means that as of December 1, a subpoena issued from an out-of-state federal district court by an attorney authorized to practice in that court presumptively is valid when properly served on a person in Wisconsin.

Similarly, under new Rule 45(b)(2), subpoenas no longer need to be served only within the district of the issuing court or within 100 miles of the place of trial, deposition or production. Rather, subpoenas may now be served at any place within the United States. Service still requires 'delivering a copy to the named person,' although some practitioners have suggested that the change to the service provision leaves room for dispute over what constitutes proper service if the issuing jurisdiction allows for service by certified mail.

Changes to Rule 45(c)(1) confirm that a subpoena can require a nonparty to travel for a deposition, hearing or trial, or to produce documents, up to 100 miles from where the person lives, works or regularly transacts business. A subpoena requiring attendance at trial (not a deposition or hearing) also can compel a nonparty to travel anywhere within the state where the person lives, works or regularly transacts business – regardless of distance – if the travel does not require 'substantial expense'. A *party's* or a *party's officer's* attendance at a deposition, hearing or a trial can be required anywhere in the state where the party lives, works or regularly transacts business regardless of distance or expense.

Happily, the amended rules also make life a bit easier for those responding to subpoenas. The amendments clarify and confirm that the court for the district where compliance with the subpoena is required has jurisdiction over disputes regarding the subpoena. Thus, a motion to quash or modify a subpoena properly is filed in the court for the district where attendance at deposition or trial is required or where documents are to be produced. That court may transfer the motion to the issuing court only if the person subject to the subpoena consents, or due to exceptional circumstances. Even then, the responding person's attorney authorized to practice in the district where compliance is required may file papers and appear on the motion as an officer of the issuing court without requiring a separate admission to practice. Guidelines to the amended rule also encourage courts to allow telephone hearings to further minimize the burden on nonparties when a motion is transferred to the issuing court. For purposes of enforcing its order, the issuing court may transfer the order back to the court where the motion was made and where compliance with the subpoena is required.

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